In the

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903

LENA M. SLATER et al.,
Petitioners,
vs.
MEXICAN NATIONAL RAILROAD CO.,
Respondent.

No. 943

Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States.

NOVEMBER TERM, 1902.

Petition for Writ of Certiorari requiring the Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court, for its review and determination, the case of the Mexican National Railroad Company, plaintiff in error, versus Lena M. Slater et als., defendants in error.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition of Lena M. Slater and her minor children, William F. Slater, Jesse R. Slater, Annie E. Slater and Henry G. Slater, respectfully shows to this Honorable Court as follows:

(1) Your petitioners being citizens of the State of Texas, residing in Webb county, on the 17th day of November, 1900, brought their action at law in the Circuit Court of the United States for the Western District of Texas at Laredo, against the Mexican National Railroad Company, a corporation created under the laws of the State of Colorado, to recover damages on account of the death of William H. Slater, caused by the negligence of the railroad company. Lena M. Slater is the surviving wife, and the minors the children of the deceased, William H. Slater.

In addition to the usual allegations of negligence causing the injuries which resulted in Slater's death, which occurred in the State of Tamaulipas, in the Republic of Mexico, your petitioners set out the statute laws of Mexico, and alleged that under the

laws set out they had a right of action for such damages. They alleged that they "were each dependent for their support and maintenance upon the earnings of deceased, upon which fact and upon other considerations, particularly the legal obligation of the deceased to support them, and his love and affection for them, they base their expectations of pecuniary aid from said deceased. * * * That they reasonably expected to receive, and in fact would have received in money from the earnings of deceased thirty thousand dollars."

(2) The defendant was duly cited, appeared and answered.

(3) The defendant by demurrer in the trial court questioned the jurisdiction of the Circuit Court on the ground "that it affirmatively appears from plaintiff's petition that the right of survivors to recover damages for personal injuries resulting in death is alimony or pension, payable in installments, and is, therefore, so dissimilar from the laws of Texas, and the common law that this court cannot administer or enforce said laws and rights." (This was special exception No. 2, filed March 18th, 1902.)

There were other exceptions substantially to the same effect. They were all overruled.

(4) The answer of defendant included a general denial; an allegation that the laws of Mexico are unlike and dissimilar to the laws of Texas, and that the right under the laws of that country is to recover alimony or pension, a right unknown to the laws of Texas, for the enforcement of which no law of Texas, or of the United States has been provided, and that, therefore, the court is without jurisdiction to grant the relief prayed for. Contributory negligence was also pleaded in defense.

(5) The trial on March the 20th, 1901, was before a jury, and resulted in a verdict for the plaintiffs, apportioning to each a specific sum of money, the several sums aggregating $7,000.00, and judgment was entered accordingly.

(6) That the case was taken by the Mexican National Railroad Company, on writ of error, to the Circuit Court of Appeals for the Fifth Circuit, at New Orleans, where, on April 22nd,

1902, it was reversed and remanded, with direction to the trial court to sustain special exception No. 2, filed by the defendant on March the 18th, 1901, and to dismiss the plaintiff's action.

The conclusion reached by the Honorable Circuit Court of Appeals, leading to the reversal, is thus expressed: "That the right of the survivors to recover damages for personal injuries resulting in the death of William H. Slater is alimony, or pension payable in installments for uncertain and indeterminate periods, dependent upon conduct of beneficiaries and conditions impossible to forecast, and is, therefore, so dissimilar from the laws of Texas, and the common law that the Circuit Court in an action at law can not administer the same and enforce the rights of the plaintiffs so as to do substantial justice between the parties."

(7) Your petitioners asked for a rehearing in the said Circuit Court of Appeals, praying that the same should be granted and that the case might be certified to the Honorable Supreme Court on the question of jurisdiction, which was denied on May 31st, 1902.

A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished as a part of this application in conformity with Rule 37 of this Honorable Court, relative to cases from Circuit Court of Appeals, and the same is marked "Exhibit A."

(8) Your petitioners are advised and believe that the said judgment of the said United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for review and determination under and in conformity with the provision of the Sixth section of the Act of Congress, entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3rd, 1891. The jurisdiction of the Circuit Court depending entirely upon the parties to the suit being citizens of different States, viz.: Texas and Colorado, the judgment is made final in the said Circuit Court of Appeals by the said act.

(9) The border between this country and the Republic of Mexico is extensive. The two countries are connected by great carrier systems—arteries of international trade and commercial intercourse. Some of these systems are citizens of this country. One of them (the defendant in this case) is chartered under the laws of the State of Colorado. Citizens of the United States seek and obtain employment on this and other such roads, and are occupied in the line of such employment within the limits of both countries, rendering service partly in one and the other, while hundreds of our citizens daily are transported by these carriers between the two countries, both on business and pleasure. Thriving towns and cities are along the border of the two countries, whose inhabitants mingle freely together and enjoy the most intimate social and business relations. The two nations at such places are connected by electric street cars; and electric light companies, having plants and places of business on this side of the Rio Grande, extend their wires to the other side and furnish power and light to parties residing over there.

The existence of such relations, it is respectfully submitted, makes the question of the proper adjudication of this case one of gravity and importance, and of international concern.

Its gravity and importance is greatly increased by the fact that its correct solution involves the proper construction of the laws of a foreign country which have not before this been construed. Many cases are now pending in the United States Circuit Courts in Texas awaiting the final solution of the question, adding force to the contention that this is a proper case for the exercise of the power of this Honorable Court in granting the writ of certiorari. Ex-parte Lau Ow Bew., 141 U. S., 583.

(10) The case at bar was decided in the said Circuit Court of Appeals against the contention of your petitioners to-wit: (1) That under the laws of Mexico a clearly defined right of action exists for damages arising from injuries resulting in death caused by negligence; and that a proper construction of Articles 301, 304, 311 and 318 of the penal code of Mexico leads to the conclu-

sion that such right of action is given. (2) That support of the widow and children of deceased, payment of which may be exacted from a railroad company under the laws of Mexico, is not alimony in the statutory meaning of that term, but is made an element of damages, to be considered in estimating the amount for which a recovery may be had; and that its payment may be enforced in the courts of law of this country, without reference to the procedure of the Code of Mexico to enforce the payment of alimony. (3) That the limitations prescribed in Article 319 of the Penal Code of Mexico relate to matters of fact which may be pleaded to abate, or bar the action (the contingency having arisen) and which affect the remedy rather than the right of action—such limitations being to the effect that the obligation to furnish support shall cease, (a) when not absolutely necessary for the subsistence of those entitled to receive it, (b) when the beneficiaries get married, (c) when the minor children become of age, (d) when the deceased, if alive, would not be required to continue the support.

As to these limitations your petitioners' contention is in effect that, while in the courts of Mexico a cause of action for damages growing out of injuries causing the death of a person would abate, if it be shown that any of the contingencies mentioned in Art. 319 existed, yet that the action would not abate under the laws of this country.

In the case of B. & O. Railroad Co. vs. Jay, 173 U. S., 226, the following question was referred to the Supreme Court of the United States: "Does an action pending in the Circuit Court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana, finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if suit had been brought in Indiana, the action would have abated in that State?" The answer to this question, it is respectfully submitted, sustains your petitioners' contention. The court, in giving a negative answer, say: "It is

scarcely necessary to say that the determination of the question of the right to revive this action in the name of Hervey's personal representative is not affected in any degree by the fact that the deceased received his injuries in the State of Indiana. The action for such injuries was transitory in its nature, and the jurisdiction of the Ohio court to take cognizance of it upon personal service or on the appearance of the defendant to the action can not be doubted. Still less can it be doubted that the question of the revivor of actions brought in the courts of Ohio for personal injuries is governed by the laws of that State, rather than by the law of the State in which the injuries occurred."

It would seem that the case cited is stronger than the case at bar, in this: The contingency of plaintiff's death had actually arisen, and it was sought to apply the law of Indiana; while in the case at bar, none of the contingencies prescribed in the law of Mexico had arisen, and it was not contended that there was not a perfect, subsisting cause of action under the Mexican law. It was, therefore, contended that the Circuit Court of Appeals could not properly consider the question, the contingencies prescribed in the article mentioned not having arisen. Had any of the facts existed or occurred after institution of the suit, it would seem that the case cited would indicate the course to be taken, viz: That the cause should proceed to judgment according to the law of the forum.

Your petitioners are advised and believe that the said Circuit Court of Appeals has erred in denying the relief for want of jurisdiction or power in the courts of law of this country, and especially in the courts of law of the United States to hear, determine and adjudicate the said case; that said Circuit Court of Appeals has erred in holding the remedy of your petitioners to be alimony, or pension, recoverable as such under the laws of Mexico, and that for lack of a similar remedy in our country, your petitioners can not obtain relief in an action at law in the Circuit Court of the United States; that the said Circuit Court of Appeals has erred in giving a construction to the laws of Mexico suggested by

the statements contained in a deposition taken in the case, but which was not admitted on trial; and thus were your petitioners deprived of an important and valuable right, viz.: To meet such testimony by evidence in rebuttal; and the statements so considered lead to an unreasonable construction of the laws of Mexico, not shown to be the construction placed upon those laws by the courts of that country.

(11) Where a railway company, by negligence, has brought itself under obligation to furnish support as damage for injuries resulting in death, it does not also have the right to demand support. The obligation as to alimony under the law of Mexico is reciprocal. "The one who furnishes alimony has in his turn the right to demand it." (Art. 205.) The recovery, therefore, against a railway company can not be alimony.

It will be observed that by Art. 318, certain expenses incurred in attending the injured person prior to his death, his funeral expenses and injury resulting to his property, are made elements of damage. Another element is the damage which results to the surviving wife and children on account of the death. The first mentioned elements of damage could, perhaps, be recovered without the aid of statute, but the last could not be the foundation of an action without such aid. The damages, therefore, which the widow and children may recover under the law of Mexico, in addition to the elements first mentioned, is compensation for their pecuniary loss, viz.: The value of the support of which they have been deprived. Considering all these elements of damage in arriving at the amount to which the widow and children are entitled, it would seem that the laws of Mexico and Texas or the United States are not so unlike that our courts are without jurisdiction in the premises, but rather that the laws are similar, and the public policy of the two countries in that respect are the same.

As to the power and duty of the court to hear and determine a controversy or cause of action arising under the laws of another country, it being a transitory action and not against the policy of this country, there is no question. The court inquires, not wheth-

er the laws are similar or unlike, but whether the policy of this country forbids the enforcement of the right. It has been announced as the true rule, that "whether the domestic law provides for redress in like cases should in principle be immaterial, so long as the right is a reasonable one, and not opposed to the interests of the State." (Storey Con. of Laws, Sec. 625, Note a.)

Now consider the nature of the right of action in the case at bar. It is founded on a negligent act causing death, which is a tort in itself, the act of negligence being in itself wrongful, and not so merely by virtue of statutory enactment. Under the common law a remedy for the loss was given; but the damage was measured by the pecuniary loss, causing incidental damages suffered, such as expenses for medical attendance, care and nursing for the time intervening between the injuries and the death. (Cooley on Torts, p. 262.) The relief thus afforded was inadequate, until the passage of Lord Campbell's Act. The purpose and effect of this act was to remove the obstacle to recovery of damages for that "which is essentially and in its nature a tort."

Mr. Justice Brewer, in Stewart vs. B. & O. Ry. Co., 168 U. S., 445, rendering the opinion of the court, says: "It may well be that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued; but, where the statute simply takes away the common law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any State in which that common law obstacle has been removed. At least it has been held by this court in repeated cases that an action for such a tort can be maintained 'where the statute of the State in which the cause of action arose is not, in substance, inconsistent with the statutes or public policy of the State in which the right of action is sought to be enforced." (Citing in his opinion Railroad Co. vs. Cox, 145 U. S., pp. 593, 605; Dennick vs. Railroad Co., 103 U. S., p. 11; Huntington vs. Attrill, 146 U. S., p. 657; Railroad Co. vs. Babcock, 154 U. S., p. 190.)

The law of Mexico, Articles 301, 304, 305, 311 and 318, Penal Code, it is respectfully submitted, removes the obstacle in the way of redress for the loss occasioned by the wrongful death of a person. The right of action exists in favor of the surviving wife and children both in Mexico and Texas.

(12) It appears from the testimony given on the trial (printed Record pp. 43 and 51) that Mr. Slater was injured one day in the Republic of Mexico, and was brought across to this country and died the following morning. Unquestionably, if he had survived, he could have maintained a suit for his injuries in the court in which this action was filed. Barrow Steamship Co. vs. Kane, 170 U. S., 105. Evey vs. Mexican Central Railway Co., 81 Fed. Rep., 294. While he was yet alive, which was several hours after his injury, he could have filed his suit, and the jurisdiction of the court could not have been questioned. The Revised Statutes of Texas, Article 3353*a*, provides that such suits shall not abate upon the death of the plaintiff, but shall survive to and in favor of his heirs and legal representatives. It would, therefore, appear, that if the suit had been filed by him before his death it afterwards could have been prosecuted by the present plaintiffs; whereas the jurisdiction was defeated because the heirs and legal representatives filed the suit direct, instead of prosecuting the action that might have been filed by the party receiving the injury which subsequently resulted in his death.

It is true the causes of action are not the same. In one, the suit is to recover damages occasioned to the injured person. Death intervening the action is prosecuted to judgment for damages to the injured person. In the other, the suit is for damages accruing to certain relatives on account of the negligent killing of deceased. But while the causes of action are different, the recovery is based, in each instance, on the same acts of negligence and the substantial relief afforded is the same in each. The diverse citizenship having brought the parties within the jurisdiction, and the defendant having appeared and answered, the power to adjudicate the case could not be defeated upon the contention of respondents.

Opposing counsel contended, and the Circuit Court of Appeals held, that the laws of Mexico did not provide for a recovery *in solido;* and upon this ground plaintiffs were denied any relief. The fact that the laws of Mexico give a right of action is not denied by counsel or by the court. How the damages are to be paid, or when, or by what means the payment shall be enforced, are questions solely pertaining to the remedy, matters which were never before known to defeat the jurisdiction of a court.

AUTHORITIES.

In the case at bar the Court recognizes a right without affording a remedy. Under the laws of Kentucky, real estate levied on and sold under execution may be redeemed by the owner. Will the courts of Texas refuse to enforce a contract made in that State because no such right of redemption is given by the laws of Texas?

If the Mexican law, under some circumstances, requires payment of damages to be made monthly, yet Article 220 (Printed Record p. 8) provides that security for such payments may be exacted in form of a mortgage, a bond, or a deposit of a sufficient amount; and it would seem that the court has the authority to require the entire amount awarded as support (damages) to be paid by the defendant *in solido.*

The difference in the laws of the two countries respecting the recovery of damages would seem, therefore, to be found in the manner of procedure, rather than in the substantial relief afforded. If in Mexico, the relief is in the nature of alimony, payable in installments, secured in advance by mortgage, bond or deposit, in Texas, that same relief is given, estimated at its present value and taking the form of a judgment for a specific sum. If under the facts of this case, applying the law of Mexico, it should appear that Slater's earnings (fifty dollars per month) were devoted to the

maintenance of his family and the education of his children, and that such amount would be the alimony which the wife and children should receive, then a deposit or security sufficient to produce six hundred dollars per annum could be exacted. Under the same facts, applying our laws, the present value of the same relief is ascertained from all the facts and circumstances, and judgment rendered for that amount.

As a limitation upon the monthly payment of damages, or support, the Mexican law provides that it shall cease when the females entitled thereto shall marry. The learned judge, speaking for the Circuit Court of Appeals, says that a jury might be able fairly and justly to assess in a lump sum the value of the right secured to the male beneficiaries; but says that in the case of females this could not be done because no human intelligence can tell when a woman is going to marry. It is true that difficulty lies along the path of such investigation, but do we meet any more uncertainties here, than when we attempt to arrive at the probable duration of the life of the beneficiaries; or, seek to calculate, by the aid of finite experience, the length of life the deceased would have enjoyed, the knowledge of which rests only with the Infinite? Marriage, as to the probable time of its consummation, is no more uncertain than death; and the jury, in the light of all the circumstances, aided by their general knowledge and experience, can fix the probable date of the one as well as they can arrive at the approximate time of the other.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein entitled the Mexican National Railroad Company, plaintiff in error, *versus* Lena M. Slater *et al.*, defendants in error, to the end that said case may be reviewed and determined by

this court as provided in section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3rd, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

Wm. A. Keller

Mason Williams

E. A. Atlee

attorneys for Petitioners

THE STATE OF TEXAS, }
COUNTY OF BEXAR. }

E. A. Atlee, being duly sworn, says that he is one of the attorneys and of counsel for Lena M. Slater, and her minor children, the Petitioners, above named, and as such has personal charge for them of the case in the foregoing petition mentioned, in the Circuit Court of the United States for the Western District of Texas, at Laredo, Texas, and in the United States Circuit Court of Appeals for the Fifth Circuit; That he has read the said petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

(signed) E. A. Atlee

Sworn to and subscribed before me this 22nd day of November, 1902.

(signed) James F. Boyle
Notary Public Bexar County, Texas.

Notarial Seal